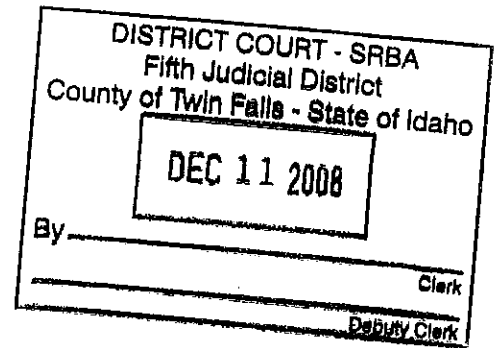


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DEC 15 2008

Department of Water Resources
Adjudication Bureau



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	SPECIAL MASTER'S REPORT
	)	
Case No. 39576	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
	)	FOR WATER RIGHTS 63-00123F
	)	and 63-00123G
	)	
	)	SPECIAL MASTER'S
	)	RECOMMENDATION OF
	)	DISALLOWANCE FOR WATER RIGHT
	)	CLAIM 63-00123D

Summary of Ruling: The Subdivision consists of 170 irrigable acres. The *Director's Report* for these rights was based upon a duty of water of 0.02 cfs (one miner's inch) per acre. Neither party has rebutted the presumption of the *Director's Report*, and accordingly it is the recommendation of this Special Master that Lexington HOA's water right should be decreed for 3.40 cfs, which is 0.02 cfs per acre multiplied by 170 acres. The remaining 1.205 cfs should be decreed to Lexington Hills Inc. East Hills Development's claim should be disallowed. The partial decrees issued for water rights 63-00123F and 63-00123G should contain the following remark: The ability to transfer this water right pursuant to Idaho Code § 42-222 is contingent upon a finding by the Department that such transfer will not be cause for the Department to further limit the use of water right 63-11413.

I. APPEARANCES

John K. Simpson and Paul L. Arrington, Barker Rosholt & Simpson for Lexington Hills Homeowners' Association.

John M. Marshall and Michael P. Lawrence, Givens Pursley LLP, for East Hills Development LLC / Lexington Hills, Inc.

II. PROCEDURAL BACKGROUND

The above-captioned subcases involve a dispute over the ownership of water rights between the Lexington Hills Home Owners' Association, Inc., ("Lexington HOA") and the developer of the subdivision, Lexington Hills, Inc., and East Hills Development, LLC (collectively "Lexington Hills"). The underlying basis of these water right claims is a 4.605 cubic feet per second ("cfs") portion of a 20 cfs surface water right previously decreed in the *Stewart Decree*, and historically referred to as "Jacobs water." The land which comprises the place of use for this 4.605 cfs portion of the Jacobs water is now a residential subdivision (the "Subdivision"). The Lexington HOA owns and operates the pressurized irrigation system used to irrigate the Subdivision. Lexington HOA filed claim number 63-00123G in the SRBA for the entire 4.605 cfs of the Jacobs water right. Lexington Hills filed claim number 63-00123F, asserting it had retained ownership of a 1.93 cfs portion of the right. East Hills filed claim number 63-00123D for a 0.5246 portion of the right.

Each party moved for summary judgment, and on April 18, 2007, this Special Master issued a *Memorandum Decision and Order on Cross Motions for Summary Judgment* ("*Summary Judgment Order*") holding that Lexington Hills "intended to reserve all water rights, but to obligate itself, as the development proceeded, to transfer sufficient water rights to the Lexington HOA." *Summary Judgment Order* at 8. This Special Master further found that Lexington Hills had conveyed 2.388 cfs to the Lexington HOA. *Id.* at 11. Following summary judgment proceedings, this Special Master identified a single remaining issue left for trial: "Has [Lexington] transferred water rights to [Homeowners] in an amount that it obligated itself to transfer in the Master Declaration [of Covenants, Conditions, Restrictions, and Easements for Lexington Hills (hereinafter "Master Declaration"))]" *Id.* at 12.

The parties agreed to address this factual question by exchanging expert testimony in advance of trial addressing two precise questions: (1) the number of irrigated acres within the Subdivision; and (2) the quantity of water necessary to irrigate those acres.

Lexington HOA's expert report, however, raised the issue of whether, and how, conditions placed on the approval of water right permit number 63-11143 (a municipal ground water permit issued to Lexington Hills and subsequently transferred to the City of Eagle) might affect the elements of Lexington HOA's and Lexington Hills's water rights. Specifically, the Lexington HOA asserted that Lexington Hills is barred from moving any portion of water right

63-123 away from the Subdivision because it obligated itself in the approval proceeding for permit 63-11413 to leave all surface water rights with the subdivision.

Lexington Hills filed a *Motion in Limine* requesting this Special Master issue an order precluding the Lexington HOA from offering evidence regarding water right permit number 63-11413 at trial. A hearing was held and this Special Master denied Lexington Hill's Motion for the reason that the conditions placed on water permit number 63-11413 might be relevant to determine how much water is sufficient to irrigate the Subdivision.

This Special Master granted the parties' request to file post-trial briefs. Those briefs have been filed and this matter is deemed fully submitted for decision.

III. ISSUES PRESENTED AT TRIAL

As stated in the *Summary Judgment Order*, a trial in these subcases was necessary to determine the amount of irrigation water required by the Master Declaration to be transferred from Lexington Hills to Lexington HOA for the irrigation of the Subdivision. This necessarily requires a determination of (1) the number of irrigated acres within the Subdivision; and (2) the quantity of water necessary to irrigate those acres.

IV. FINDINGS OF FACT

A trial was held in Boise, Idaho, on September 3, 2008. The Special Master, having heard the testimony of the witnesses and having reviewed other evidence produced at trial, and having considered the closing arguments of the parties and the post trial briefing and the proposed findings of fact and conclusions of law of the parties, makes the following findings of fact and conclusions of law.

A. Pre-Development Duty of Water

1. Lexington Hills, Inc., and East Hills Development, LLC are the developers of a residential subdivision located in Eagle, Idaho. The entire project area is 328 acres, and is comprised of 3 different areas (collectively referred to as the "Subdivision"): a) Lexington Hills Subdivision Nos. 1 - 12; b) East Hills Nos. 1 and 2; and c) Lexington on the Rim.

2. The water rights at issue comprise a 4.605 cfs portion of a 20 cfs surface water right previously decreed in the *Stewart Decree*, and historically referred to as "Jacobs water."

3. Prior to being developed into a residential subdivision, the historic duty of water on the irrigated farm ground was likely 0.78 inches per acre. This historic duty of water excludes the Lexington on the Rim phase, which had not been historically irrigated.¹

4. Although the historic duty of water on the irrigated farm ground was likely 0.78 miner's inches per acre, based upon the evidence in the record this duty of water is not instructive as to the duty expected of water for irrigated residential landscaping in the Subdivision. First, there is no information in the record regarding the irrigation delivery system that was used on the irrigated farm ground and therefore no comparison can be made as to the relative efficiencies between that system, whatever it may have been, and the pressurized irrigation system now in use in the Subdivision. Secondly, the irrigation of the farm land was likely controlled by one individual, whereas the irrigation in the Subdivision is now controlled by several hundred individuals, subject to whatever regulations may have been promulgated by the Lexington HOA concerning watering times / days and rotation. Third, the watering of residential landscaping is typically conducted during hours that do not include the hottest part of the day, whereas farm land irrigation typically makes no such omission. Accordingly, there is insufficient information in the record to allow this Special Master to make a definite finding regarding whether the predevelopment duty of water on the irrigated farm ground bears any relationship to the duty expected of the water for the irrigation of residential landscaping.

B. Number of Irrigated Acres Within the Subdivision

5. The *Director's Report* for water rights 63-00123D, 63-00123F, and 63-00123G recommended a cumulative total of 230.23 acres allowed to be irrigated within the boundaries of the Subdivision. The boundaries were described using a digital boundary. In preparing the recommendations for these three rights, the Department did not independently evaluate the number of irrigable acres, but rather set the number of acres based upon how much land could be irrigated with the 4.605 cfs water right at 0.02 cfs per acre (i.e. 4.605 divided by 0.02 equals 230.25).

¹ Lexington HOA argues in its *Response to Lexington Hills Inc.'s Post-Trial Brief* at p. 5 that the record is devoid of any evidence as to the number of acres historically irrigated. This Special Master notes, however, that the June 1987 aerial imagery submitted into evidence as IDWR Exhibits 4 and 5 show that the area that became Lexington Hills Subdivisions Nos. 1-12 was almost entirely irrigated at that time, and further that the areas that became Lexington on the Rim and East Hills were not irrigated at the time the photograph was taken.

6. This Special Master finds that the Subdivision contains 170 irrigable acres. Lexington Hills's expert, Terry M. Scanlan, testified that he arrived at this figure by analyzing 2003 aerial imagery (provided by the Ada County Assessor's Office), and using Geographic Information System (GIS) software. Mr. Scanlan testified that he first divided the Subdivision into four land use categories: roads, common areas, schools, and residential lots. The GIS software was then used to estimate the total irrigated acreage within each land use category.

7. The roads in the Subdivision cover approximately 50.4 acres and are non-irrigated. Small irrigated islands within the roadways are included in common areas.

8. The common area within the Subdivision comprises a total of about 42.7 acres, which includes 3.7 acres of pond surface area. Of this 42.7 acres, 3 acres are non-irrigated.

9. One school is located within the Subdivision, with approximately 5.4 acres of the 10 acre school parcel being irrigated.

10. There are 634 residential lots within the Subdivision, which range from 0.11 to 1.62 acres in size. To determine the irrigated area within the residential lots, Mr. Scanlan first divided the lots into four size categories. Next, a representative number of lots were selected from each category. Third, the irrigated area was determined for the sample lot based on detailed digitized analysis using the GIS software and the 2003 aerial imagery. Finally, the percent irrigated area within each sample group was extrapolated to determine the approximate total irrigated area within the 634 residential lots.

11. Lexington HOA's expert, David B. Shaw, testified that he estimated the number of irrigated acres within the subdivision to be 182.9 acres, or 12.9 acres more that was calculated by Mr. Scanlan. Mr. Shaw did not conduct his own study to arrive at this figure, but rather relied upon a study conducted in 2001 by Roylance and Associates.

12. At trial the engineer who conducted the 2001 study used by Mr. Shaw, David H. Roylance, testified that the analysis of irrigable acres conducted by Mr. Scanlan was more accurate because Mr. Scanlan's GIS tools were superior to those used by Mr. Roylance in conducting the 2001 study. Accordingly, this Special Master finds the study conducted by Mr. Scanlan to be more reliable.

C. Irrigation Requirements of the Subdivision

13. The Master Declaration requires that all front yards, side yards facing onto streets, and all areas abutting on the Subdivision common areas be landscaped, sodded and maintained in a professional manner. The Master Declaration further states: "Landscaping and vegetation shall be watered, pruned, cut and maintained weed-free according to good landscape practice and in good appearance." Master Declaration sections 7.11(b) and (c).

14. The homeowners in the subdivision -- both individually and collectively through the Lexington HOA -- have very high expectations regarding the quality of landscaping in the Subdivision. As exemplified by the testimony of Dale Conder, the Subdivision is perceived to be well built and well designed, and the common areas are an integral component of this perception. Mr. Conder testified, and this Special Master finds, that brown or dying vegetation is unacceptable to the homeowners of the Subdivision. The homeowners expect the landscaping to be adequately watered and maintained for the purpose of protecting the value and desirability of the property in the Subdivision.

15. The developer of the Subdivision and drafter of the Master Declaration, Lexington Hills, has always intended to provide sufficient water rights to the Lexington HOA to maintain the distinctive residential character of the Subdivision, which is set apart from other communities by its extensive and well landscaped common areas and homes. Lexington Hills intends to provide sufficient water rights to allow a homeowner to comply with his/her obligations set forth in Sections 7.11(b) and (c) of the Master Declaration. Lexington Hills does not intend to convey water rights to Lexington HOA that cannot be put to beneficial use in the Subdivision.

16. Lexington HOA was created to, among other things, effectuate the delivery of irrigation water to the landowners within the Subdivision and to be responsible for irrigation and maintenance of the common areas in accordance with the Master Declaration. Lexington HOA owns and operates the pressurized irrigation system used to irrigate the Subdivision.

17. The water rights at issue herein are delivered to the Subdivision through the Farmers Union Canal headgate No. 39. There are no functioning measuring devices with which to measure the water delivered to the Subdivision through headgate No. 39.

18. The water delivered through headgate No. 39 flows through a 21 inch plastic pipe and into a system of three interconnected ponds located near the southwest corner of the Subdivision. The pumps for the pressurized irrigation system are located at one of these

interconnected ponds. The water surface elevation of the ponds is at the same elevation as the Farmers Union Canal, which is at an elevation of approximately 2,604 feet. The quantity of water that flows into the ponds matches the quantity of water used by the irrigation system, plus the quantity of water evaporated from the surface of the ponds themselves, plus seepage. Water that is not used by the Subdivision flows down the canal.

19. The useable storage capacity of the ponds is approximately 9 acre feet. David Roylance was involved in the design of the irrigation system and testified that the large pond system was incorporated into the design of the system for the purpose of equalizing the peaks and valleys of the water demanded by the users of the pressurized irrigation system.

20. There is an overflow from the pond system that can discharge water under Floating Feather Road to the south. The pond system is designed so that irrigation water does not flow through the overflow structure, which is set at a higher elevation than the surface of the canal, but rather the overflow is part of the Subdivision's storm water retention system.

21. The pressurized irrigation system is not fitted with any flow measuring devices that could be used to measure the amount of water pumped into the irrigation delivery system.

22. The ponds that feed the pressurized irrigation system can also be filled by using groundwater diverted under water right permit number 63-11413, which is a water right for municipal purposes owned by the City of Eagle. Both before and after the water in the Farmers Union Canal is turned off, groundwater from water right permit number 63-11413 can be used for the purpose of keeping the ponds full, and to supply shoulder season irrigation water to the Subdivision.

23. The evidence presented at trial regarding the quantity of water necessary to irrigate the Subdivision consisted entirely of the theoretical calculations of the parties' respective experts. No measuring device(s) exist to allow measurement of Subdivision water use, and therefore the record contains no information showing the actual historical water use in the Subdivision.

24. As testified by Lexington HOA's expert David B. Shaw, the theoretical short term peak irrigation requirement necessary to support vigorous turf with no stress during the hottest 3-day period within a five year period is in excess of one miner's inch per acre. Theoretical calculations such as this, however, require assumptions of a number of variables, variations of which can cause relatively large swings in the outcome. Such swings are exemplified by the

opinions of the two expert witnesses, one of which concludes that .78 miner's inches per acre is adequate to irrigate the Subdivision, and the other expert concludes that 1.13 miner's inches is necessary, a difference of 0.35 miner's inches.

25. Lexington HOA's expert David B. Shaw made a theoretical calculation resulting in his ultimate opinion that 1.13 miner's inches per day is the diversion rate necessary to keep the grass in the Subdivision stress free in 80 out of 100 years. The *Rebuttal Testimony of Terry M. Scanlan, P.E., P.G.*, filed March 20, 2008, describes several of the variables used by Lexington HOA's expert Mr. Shaw that would tend to upwardly swing the outcome of a theoretical calculation. Mr. Scanlan states: 1) that Mr. Shaw's analysis assumes only turf, rather than a mix of turf and shrub beds; 2) that Mr. Shaw uses a 3-day 20% exceedance number rather than a 7-day 20% exceedance; 3) that Mr. Shaw did not adequately consider the available soil moisture in his analysis; and 4) that Mr. Shaw's analysis did not adequately consider the mitigation of irrigation deficits available from the water stored in the pond system. In accordance with the foregoing, this Special Master finds that a theoretical short term peak irrigation requirement of 1.13 miner's inches per acre as described by Mr. Shaw does not support a finding that the actual irrigation requirement for the subdivision is greater than one miner's inch per acre.

26. Lexington Hills' expert Terry M. Scanlan also made a theoretical calculation of the irrigation requirement for the Subdivision, and ultimately concludes that the diversion rate necessary to irrigate the Subdivision is 0.78 miner's inches per acre. One of the differences between Mr. Scanlan's and Mr. Shaw's analyses is that Mr. Shaw opted to use a 3-day 20% exceedance number, whereas Mr. Scanlan chose the 7-day 20% exceedance number. Mr. Scanlan's testimony is that the number he chose could result in a situation where during the peak summer heat the amount of water available to irrigate the turf in the Subdivision would be slightly less than the amount that the grass could potentially utilize for optimum growth. In other words, the grass may look slightly wilted for a few days during these hot periods, but that such stress is not excessive. However, based upon the intent of Lexington Hills regarding the irrigation of the subdivision as found in Finding of Fact No. 14 above, and upon the expectations of the homeowners as found in Finding of Fact No. 13 above, and further based upon the obligation of the homeowners to water, prune, cut maintain their landscaping and vegetation "according to good landscape practice and in good appearance," this Special Master finds that

the duty expected of the water under Mr. Scanlan analysis is inadequate to ensure that these considerations are met.

27. There is no evidence in the record regarding the amount of conveyance loss from the point of diversion on the Boise River in T03N R02E Section 5, to the place of use located in T05N R01E Section 3. In its *Post-Trial Brief*, Lexington Hills states: “Recall that IDWR confirmed at trial that Farmers Union Ditch Company holds a portion of the Jacobs right . . . for the purpose of conveyance losses in the canal.” *Lexington Hills Inc.’s Post-Trial Brief* at 14, fn 12. This Special Master recalls no such testimony at trial. IDWR Trial Exhibit 6, which is a Memorandum prepared by former water right agent Mel Schulte, describes a contract dated July 17, 1916 between Farmer’s Union Ditch Company and W. A. Keyt, which transferred ownership of one-third of 1,000 miner’s inch Jacobs right (333 inches) to the Farmer’s Union Ditch Company “as compensation for delivering the remaining two-thirds of the right to land of interest of Keyt . . .” IDWR Trial Exhibit No. 6. At trial, water rights agent Jan Shurte testified that the agreement between the Farmers Union Ditch Company and a Mr. Keyt transferred one-third of the Jacobs right for conveyance. Agent Shurte did not say that the one-third was for conveyance loss. In other words, the record in these subcases indicates that 333 miner’s inches conveyed to the Farmer’s Union Ditch Company was the consideration paid by Mr. Keyt for delivery of his water. There is no indication in the record that Farmer’s Union Ditch Company agreed to use its 333 inches of water to absorb the conveyance losses in the canal. A copy of the July 17, 1916 contract is not in the record. Accordingly, for purposes of determining the amount of water necessary to irrigate the Subdivision, this Special Master finds that such amount needs to be calculated from the point of diversion on the Boise River rather than at the point of rediversion at headgate No. 39. The testimony of Lexington Hills’ expert Terry Scanlan does not appear to provide for any conveyance loss between the point of diversion and the point of rediversion.

V. CONCLUSIONS OF LAW

1. The Master Declaration contractually requires Lexington Hills to convey irrigation water rights to Lexington HOA in an unspecified amount. Section 5(d) of the Master Declaration states: “Surface water for irrigation appurtenant to each phase of development of the

Property will be conveyed to the Association as each plat is recorded.” Master Declaration at p. 5.

2. Although the Master Declaration is silent as to the amount of such water, it does speak to the type of landscaping required in the Subdivision. Sections 7.11(b) and (c) state:

(b) The front yard area, side yards facing onto streets and all areas abutting on Common Area, shall be landscaped, sodded and maintained in a professional manner. Homeowners shall be responsible for landscaping rear and side yards not abutting on streets or Common Area, in accordance with an approved landscaping plan.

(c) Landscaping and vegetation shall be watered, pruned, cut and maintained weed-free according to good landscape practice and in good appearance.

3. Under Section 13.2 of the Master Declaration, the Lexington HOA is charged with owning and operating pressurized irrigation water system. Lexington HOA is required to “regulate the use of water to conserve its availability for Lots and for the Common Area.”

4. When interpreting restrictive covenants that apply to the use of real property, courts generally apply rules of contract construction. *Pinehaven Planning Board v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003).

5. A two step process is used in applying rules of contract construction. The first step is to examine the plain language of the contract and determine whether or not there is an ambiguity. *Id.* Uncertainties should be treated as ambiguities. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). The determination of ambiguity is a question of law. *Brown v. Perkins*, 129 Idaho 189, 192, 923 P. 2d 434, 437 (1996).

6. This Special Master concludes that the Master Declaration is uncertain regarding the quantity of water required to be conveyed from Lexington Hills to Lexington HOA.²

7. In the circumstance where ambiguity or uncertainty exists, the second step in applying rules of contract construction is to determine the intent of the drafter (i.e. the intent of Lexington Hills). Such a determination is a question of fact. *Pinehaven Planning Board v. Brooks*, 138 Idaho at 830, 70 P.3d at 667 (citing *Brown v. Perkins*, 129 Idaho at 193, 923 P.2d at 438).

² In the *Summary Judgment Order*, this Special Master concluded that the Master Declaration was not ambiguous regarding Lexington Hills’ intent to reserve water rights unto itself, which would subsequently be expressly conveyed to Lexington HOA. Regarding the question of how much water, the Master Declaration is clearly uncertain.

8. In fixing the duty of water for the Subdivision, the SRBA Court should award the amount that is essential for the proper irrigation thereof, which can be economically applied without impermissible waste, which will result in the successful irrigation of the Subdivision landscaping and consistent with the requirements of the Master Declaration. An award of too little water (i.e. where the duty expected of the water is too high) would result in unreasonable expectations in economy of use, and the amount of water would fail to meet the expectations of both parties. On the other hand, an award of too much water (i.e. a low duty of water) would result in water being diverted from the Boise River that goes unused, but is prevented from being used by subsequent appropriators in order of their respective priorities.

9. Idaho Code § 42-220 requires that a court decree for an irrigation water right not exceed 0.02 cfs (one miner's inch) per acre unless it is shown to the satisfaction of the court that greater amount is necessary.

10. Although the statutory minimum duty of water in Idaho is one miner's inch per acre, a Court may set a higher duty of water for a particular tract of land. In *Farmers' Co-operative Ditch Company v. Riverside Irrigation District*, 16 Idaho 525, 102 P. 481 (1909), the Idaho Supreme Court stated: "It is the policy of the laws of this state, and it has been so declared from time to time by this court, to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes."

11. In *Van Camp v. Emery*, 13 Idaho 208, 89 P. 752 (1907), the Idaho Supreme Court stated: "In this arid country the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building . . ."

12. The policy of the State of Idaho regarding the use of water is to maximize its use and benefit and minimize wastefulness. *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61 (1960).

13. Idaho Code § 42-1411(5) states: "Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right."

14. The quantity of water recommended in the *Director's Report* was based upon a recommendation of 0.02 cfs (one miner's inch) per acre. The *Director's Report* constitutes *prima facie* evidence of the nature and extent of water rights acquired under state law. I.C. § 42-1411(4). This *prima facie* status constitutes a rebuttable evidentiary presumption. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745, 947 P. 2d 409, 418 (1997).

15. Idaho Rule of Evidence 301 governs presumptions in civil actions and provides:

In all civil actions and proceedings, unless otherwise provided by statute, by Idaho appellate decisions or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved. If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption.

16. With respect to the quantity of water necessary to irrigate the Subdivision, both Lexington Hills and Lexington HOA are asserting that the 0.02 cfs per acre quantity recommended in the *Director's Report* is incorrect. In other words, neither party sought to avail themselves of the presumption by asserting that the *Director's Report* is correct. Lexington Hills asserts that less than one miner's inch per acre is enough, and Lexington HOA asserts that more than one miner's inch is necessary. Accordingly the presumption of the *Director's Report* operates against both parties, and both are required to introduce substantial evidence to demonstrate that the *Director's Report* is incorrect.

17. Based upon the findings of fact set forth above, this Special Master concludes that neither Lexington HOA nor Lexington Hills have rebutted *prima facie* presumption of the *Director's Report* regarding the appropriate duty of water for the Subdivision, which recommended water use at 0.02 cfs (one miner's inch) per acre.

18. Based upon the findings of fact set forth above, this Special Master concludes that Lexington HOA has not met the burden set forth in I.C. § 42-220 of demonstrating that more than 0.02 cfs (one miner's inch) per acre is necessary for the irrigation of the Subdivision.

19. Based upon the ruling in the *Summary Judgment Order* that East Hills Development LLC did not reserve any water rights when it conveyed land to Lexington Hills, Inc., this Special Master concludes that water right claim 63-00123D be disallowed. *Summary Judgment Order* at p. 10-11.

20. This Special Master concludes that the ability to transfer the place of use of water rights 63-00123F and 63-00123G may be limited by the conditions set forth in water right permit 63-11413, but a determination of the extent of any limitations that may be imposed pursuant to

an administrative transfer proceeding are beyond the scope of these proceedings. The permit conditions in 63-11413 state in relevant part:

Farmers Union Canal Company water shall be utilized for the irrigation of the lots in Lexington Hills and Trail Creek Ranch parcels equal to or greater than one-half acre in size during periods when water is being delivered in the canal. This water right may be used for irrigation purposes only if the entire amount of water from the Farmers Union Canal Co. remains with the lands in Lexington Hills and Trail Creek Ranch. Sale or transfer of surface water from any portion of these properties will be cause for the Department to further limit the use of this right.

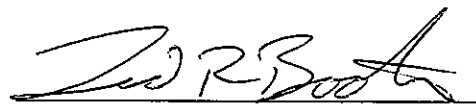
21. Accordingly, water rights 63-00123F and 63-00123G should be conditioned with the following remark:

The ability to transfer this water right pursuant to Idaho Code § 42-222 is contingent upon a finding by the Department that such transfer will not be cause for the Department to further limit the use of water right 63-11413.

VI. RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that water rights 63-00123F, and 63-00123G be **decreed** with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*. IT IS FURTHER RECOMMENDED that the SRBA District Court enter a final order **disallowing** water right claim 63-00123D.

Dated Dec 11, 2008



Theodore R. Booth
Special Master
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

DEC 11 2008

In Re SRBA)
)
Case No. 39576)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 63-00123F

By _____ Clerk

Deputy Clerk

NAME AND ADDRESS: LEXINGTON HILLS INC
1815 E STONYBROOK CT
EAGLE, ID 83616

SOURCE: BOISE RIVER TRIBUTARY: SNAKE RIVER

QUANTITY: 1.205 CFS

This right when combined with Right No. 63-123G shall provide no
more than .02 cfs per acre.

PRIORITY DATE: 06/01/1864

POINT OF DIVERSION: T03N R02E S05 NESENE Within Ada County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-01 TO 11-15	1.205 CFS

Diversion for irrigation under this water right prior to April 1
and after October 31 shall occur only as authorized by the Water
District 63 Water Master and only when water is being released
for flood control by the United States from the Lucky Peak Dam
outlet under procedures and requirements for the Memorandum of
Agreement between the U.S. Department of the Army and the U.S.
Department of the Interior for Flood Control Operations of the
Boise River Reservoirs, dated November 20, 1953, the Water
Control Manual for Boise River Reservoir dated April 1985 and
any future amendments or revisions made thereto pursuant to
state or federal procedures or law; provided that any such use
of this water right prior to April 1 and after October 31 shall
be subordinated to water rights for storage in Lucky Peak
Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson
Ranch Reservoir, as decreed in SRBA Case No. 39576.

PLACE OF USE:

THIS RIGHT IS LIMITED TO THE IRRIGATION OF 170 ACRES WITHIN THE
BOUNDARY OF THE LEXINGTON HILLS SUBDIVISION, THE LEXINGTON HILLS
EAST SUBDIVISION, AND LEXINGTON ON THE RIM.
The boundary encompassing the place of use for this water right
is described with a digital boundary as defined by I.C. Section
42-202B(2) and authorized pursuant to I.C. Section
42-1411(2)(h). The data comprising the digital boundary are
incorporated herein by reference and are stored on a CD-ROM disk
issued in duplicate originals on file with the SRBA District
Court and the Idaho Department of Water Resources. A map
depicting the place of use is attached hereto to illustrate the
place of use described by the digital boundary.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The ability to transfer this water right pursuant to Idaho Code
Section 42-222 is contingent upon a finding by the Department
that such transfer will not be cause for the Department to
further limit the use of water right 63-11413.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

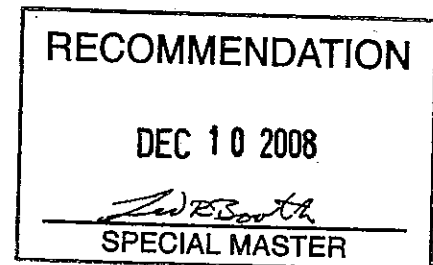
OTHER PROVISIONS (continued)

DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

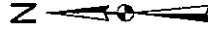
With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication



Twp. 4N, Rge. 1E

35



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 63-00123G

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
DEC 11 2008	
By _____	Clerk
Deputy Clerk	

NAME AND ADDRESS: LEXINGTON HILLS HOMEOWNERS
ASSOCIATION
2354 N STONECREST PLACE
EAGLE, ID 83616

SOURCE: BOISE RIVER TRIBUTARY: SNAKE RIVER

QUANTITY: 3.40 CFS

This right when combined with Right No. 63-123F shall provide no more than .02 cfs per acre.

PRIORITY DATE: 06/01/1864

POINT OF DIVERSION: T03N R02E S05 NESENE Within Ada County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-01 TO 11-15	3.40 CFS

Diversion for irrigation under this water right prior to April 1 and after October 31 shall occur only as authorized by the Water District 63 Water Master and only when water is being released for flood control by the United States from the Lucky Peak Dam outlet under procedures and requirements for the Memorandum of Agreement between the U.S. Department of the Army and the U.S. Department of the Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, the Water Control Manual for Boise River Reservoir dated April 1985 and any future amendments or revisions made thereto pursuant to state or federal procedures or law; provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576.

PLACE OF USE:

THIS RIGHT IS LIMITED TO THE IRRIGATION OF 170 ACRES WITHIN THE BOUNDARY OF THE LEXINGTON HILLS SUBDIVISION, THE LEXINGTON HILLS EAST SUBDIVISION, AND LEXINGTON ON THE RIM. The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The ability to transfer this water right pursuant to Idaho Code Section 42-222 is contingent upon a finding by the Department that such transfer will not be cause for the Department to further limit the use of water right 63-11413.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

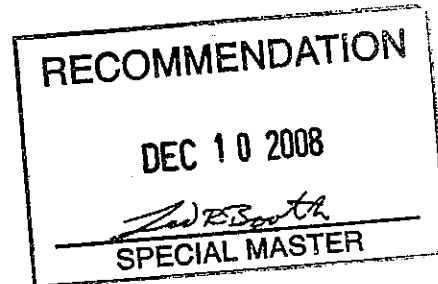
OTHER PROVISIONS (continued)

ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(5).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication



Twp. 4N, Rge. 1E

LEXINGTON HILLS HOA 63-123G



DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
DEC 11 2008
By _____ Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
Case No. 39576)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

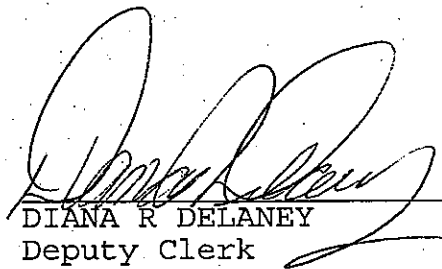
Water Right(s): 63-00123D
63-00123F 63-00123G

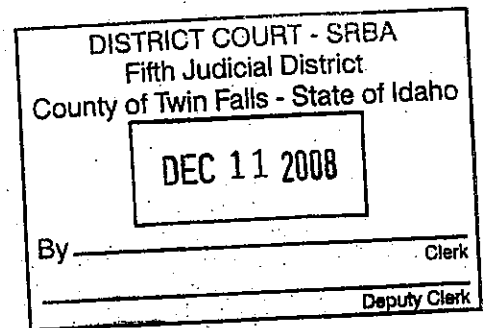
On December 11, 2008, Special Master THEODORE R. BOOTH
issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s)
pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party
to the adjudication including parties to the subcase, may file a Motion
to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate
in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION
shall constitute a waiver of the right to challenge it before the
Presiding Judge.

DATED December 11, 2008.


DIANA R DELANEY
Deputy Clerk



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)

CERTIFICATE OF MAILING

Case No. 39576)
_____)

Water Right(s): 63-00123D
63-00123F 63-00123G

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on December 11, 2008, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

LEXINGTON HILLS HOMEOWNERS

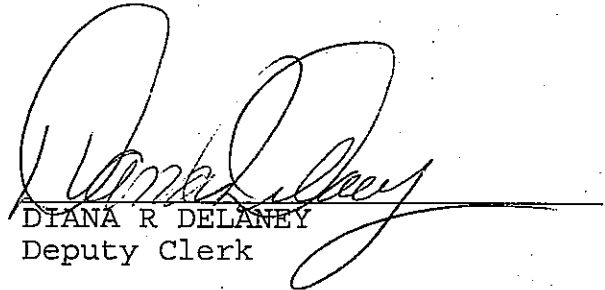
Represented by:
JOHN K SIMPSON
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

CERTIFICATE OF MAILING

PAGE 1
12/11/08

EAST HILLS DEVELOPMENT LLC
LEXINGTON HILLS INC

Represented by:
JOHN M MARSHALL
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200



DIANA R DELANEY
Deputy Clerk